# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1967

## No. 465

ELISHA EDWARDS,
*Petitioner,*

vs.

PACIFIC FRUIT EXPRESS COMPANY,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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### INTRODUCTION

Respondent has attempted to shift the focus of this case from an analysis of the scope of the Federal Employers' Liability Act by mounting an assault upon that Act and its history of broad remedial application. Such an obvious effort to distort the question at issue here serves only to reinforce petitioner's position that Pacific Fruit Express operates wholly within the railroad industry and identifies itself with the self-interest of the nation's common carriers by railroad. If respondent truly considered itself to have

some status independent of the carriage of perishable commodities by railroad, why then the need to pillory and excoriate the most humanitarian injury legislation yet enacted by Congress?

The broad reach and liberal intention of the F.E.L.A. are beyond doubt. Cf. *Urie v. Thompson*, 337 U.S. 163 (1949), demonstrating the integrated nature of federal remedies for railroad workers. Respondent devotes its most emphatic arguments to espousing that type of "hostile philosophy" against which this Court has so firmly stood. See *Wilkerson v. McCarthy*, 336 U.S. 53, 69 (1948) (concurring opinion).

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## I. PACIFIC FRUIT EXPRESS IS AN INTEGRAL PART OF THE RAILROAD INDUSTRY AS ENCOMPASSED BY THE F.E.L.A.

Railroads in the United States have handled the transportation of foodstuffs and other commodities requiring protection against heat and cold for over one hundred years. (A. 41.) Neither the record nor the brief for respondent reveal a single operation of Pacific Fruit Express which is not solely and entirely associated with the transportation of freight by railroad. While some railroad corporations perform their own protective service operations, others delegate this aspect of the services which they offer to subsidiary companies, retaining varying degrees of control over the operations.[1] Pacific Fruit Express has been de-

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[1]Report of the Interstate Commerce Commission, 318 I.C.C. 111 (1962), *Contracts for Protective Services* [hereinafter cited as I.C.C. 1962 Report]. The New York Central Railroad, for example, performs much of its own refrigeration operations. *Id.*, at 122.

scribed as a "creature of the . . . railroads"[2] whose operations are limited to those protective services required of full service railroad carriers. "Protective service against heat or cold where necessary for the preservation of perishable commodities in transit, is a duty of a common carrier by railroad for which it is responsible to the shippers of such commodities."[3] Customarily, refrigerated rail cars have been owned both by operating railroads and specialized car-line and car-service companies (usually owned by one or more full-service railroads), and occasionally by shippers of perishable commodities.[4]

The Interstate Commerce Commission in 1941 observed that Pacific Fruit Express

> does nothing which is not embraced within the duty of a carrier by railroad to the public which it serves. It owns and maintains refrigerator cars which the railroads use, and it also performs certain services for railroads in connection with the protection against heat or cold of perishable shipments. It is, in short, an agency which affords a convenient means of pooling a special type of railroad equipment and of furnishing for a group of railroads collectively certain services which require specialized and concentrated attention. It

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[2]Report of the Interstate Commerce Commission, 246 I.C.C. 145, 154 (1941), *Contracts for Protective Services* [hereinafter cited as I.C.C. 1941 Report], discussing the rate arrangements between P.F.E. and its owners.

[3]I.C.C. 1962 Report, *supra* note 1, at 112. Cf. *Cudahy Packing v. Grand Trunk Western Ry.*, 215 Fed. 93 (7th Cir. 1914); *Alton & S. R. v. United States*, 49 F.2d 414 (N.D. Calif. 1931).

[4]Report of the Interstate Commerce Commission, 56 I.C.C. 449, 454-455 (1920), *Perishable Freight Investigation.*

> [is] such an agency for convenient collective handling of an accessorial railroad service . . . .[5]

It is readily apparent that various functions wholly within the railroad industry are commonly undertaken by separately chartered corporations, sometimes owned by a single operating railroad or railroad holding company and occasionally independently owned. Each of the terminal companies, railroad stockyards, belt lines—and Pacific Fruit Express—in essence "forms a link in this chain of transportation. It is necessary to complete the avenue through which move

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[5] I.C.C. 1941 Report, *supra* note 2, at 154-155. The Commission indicated that it was bound by judicial interpretation of the status of car leasing companies as other than common carriers by railroad. It was stated in *U.S. ex rel. Chicago, N.Y. & Boston Refrigerator Co. v. I.C.C.*, 265 U.S. 292, 296 (1924), that the particular "car company" was "not a carrier by railroad, or, indeed, a common carrier at all." The Chicago Refrigerator Co. owned 1340 refrigerator cars, which it rented, but did not own or control any railroad property or facilities aside from the cars. 265 U.S. at 293-294. It does not appear to have serviced the cars either while they were in use or between journeys. Thus the company was excluded from the Transportation Act of 1920, 41 Stat. 456, 464.

Early Interstate Commerce Act and Transportation Act decisions are inapposite to the instant matter and will be considered *infra*. Noteworthy here, however, is the fact that the Interstate Commerce Commission seems to have classified refrigerator car lines and protective service operations separate from railroads generally only because of the early judicial actions regarding these companies. The Commission had earlier bowed to the expression by the courts in this matter. "Under the law as construed by the courts, car lines and others engaged in leasing cars to shippers are not common carriers and thus do not come under direct control by the Commission." Report of the Interstate Commerce Commission, 50 I.C.C. 652, 677 (1918), *In the Matter of Private Cars*. The I.C.C. 1941 Report, *supra*, clearly shows the more modern tendency of the Commission to link these operations inseparably with the railroad industry.

shipments over these lines . . . ."[6] That these various functions exist within the industry was given recognition by congressional description in the F.E.L.A. of "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Within this context, respondent cannot reasonably escape F.E.L.A. liability by characterizing itself vaguely as "closely related to railroading . . . yet not railroading itself."[7] Such a specious distinction does not survive comparison with historical reality.

Pacific Fruit Express, and other similar railroad-owned enterprises,

> were organized chiefly for the purpose of looking after perishable freight originating on the lines of their owners, and . . . *they are really a separate department of such carriers.* Separate incorporation . . . is a convenience in accounting and operation. It seems quite probable that one strong inducement for the incorporation of some of them was that at the time mileage earnings were much greater than had been received from the per diem allowance . . . . Report of the Interstate Commerce Commission, 50 I.C.C. 652, 661 (1918), *In the Matter of Private Cars.* (Emphasis added.)

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[6] *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 522 (1911).

[7] Brief for the Respondent, 8. This type of "fine distinction" has never before been used to circumscribe the railroad industry; on the other hand, such indefinable subtleties are plainly analogous to the "fine distinctions as to coverage between employees" dismissed by this Court in giving full expression to the liberal intentions of Congress in amending and re-enacting the F.E.L.A. in 1939; the amendment "evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage." *Reed v. Pennsylvania R. Co.,* 351 U.S. 502, 506 (1956).

P.F.E. performs those services and provides those facilities to the extent that the many railroad companies with which it contracts are obligated therefor.[8] P.F.E. was organized by railroads to serve the shipping public by conducting a portion of the function of the railroads.[9] The range of these activities has been detailed earlier[10] and is well documented in the Appendix. The services provided by P.F.E. are essential to the railroad industry, and under no rational view can they be considered a separate or distinct industrial operation.[11]

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[8]Report of the Interstate Commerce Commission, 253 I.C.C. 21, 33 (1942), *Contracts for Protective Services.*

[9]In this context, it is interesting to note the often overlooked provision of 45 U.S.C. § 57. Also enacted in 1908 as part of the F.E.L.A., this statute provides that the phrase "common carrier" includes the "receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." While this section was obviously intended to prevent harm to railroad workers which might result if a railroad were leased or placed in receivership, the intent of Congress is plain to prohibit discrimination against employees because the railroad might operate through different hands.

[10]See Brief for the Petitioner, 6-14.

[11]Respondent's efforts to isolate and narrow its own operations are without merit. While admitting, for example, that it owns "shop tracks and loading tracks" (Brief for Respondent, 28), later in the same paragraph it is denied that P.F.E. "performs any service in loading or unloading commodities in cars." Petitioner has no knowledge of whether P.F.E. ever actually places the perishable commodities in the cars; however, it is stated by respondent that close to 1,300,000 tons of ice annually are *loaded* into the ice compartments of the cars as they travel across the country with their cargos. (A. 43-44.) More specifically, petitioner's own job as an iceman included "loading and unloading ice in bodies of cars . . . ." (A. 22.)

P.F.E. does move rolling stock with its own shop engines to effect the repair of cars in P.F.E. shops and the furnishing of protective services. (A. 22.) In *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir.

> [The F.E.L.A.] relates to common carriers by railroad engaged in interstate and foreign commerce . . . . It is intended in its scope to cover *all commerce* to which the regulative power of Congress extends.[12]
>
> The purpose of this bill is to change the common-law liability *of employers of labor in this line of commerce* . . . .
>
> These sections make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances *used in the operation of railroads.* H. R. Rep. 1386, 60th Cong., 1st Sess. 1-2 (1908). (Emphasis added. R. 50-51.)

Respondent does not expressly deny that it is a common carrier, and it cannot reasonably do so. That its descriptive publications (A. 37-50) are distributed freely to the general public attests to its public or

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1949), the plaintiff was injured while a P.F.E. car was being moved from a loading platform. (A. 10.) Although not explicitly stated in the record, one cannot but infer that the movement of cars for icing purposes must include instances where the cars are already loaded with the shipper's product. These car movements, while unique to the area of protective services, are closely related to the service operations associated with the operation of railroad terminals.

[12]This Court recently recalled this language as "further indication of the congressional desire to cover all rail carriers that constitutionally could be covered . . . ." *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 187 n. 5 (1965). This construction finds further support in the report accompanying the Senate version of the proposed 1908 bill: "The proposed measure avoids that criticism [in the Employers' Liability Cases, 207 U.S. 463 (1908)] by confining the application of its provisions to the employees of common carriers which are within the regulative power of Congress over commerce while employed by such carrier in such commerce. In other respects the proposed measure follows in substance the act which was passed two years ago." S. Rep. 460, 60th Cong., 1st Sess. 1 (1908).

common calling.[13] Such evidence as may be furnished by commercial publications—including directory listings—must logically be considered highly illuminating.[14] This Court, however, has determined without recourse to any specific public holding out that various enterprises in the railroad industry are common carriers by railroads. See, for example, *Union Stockyard v. United States,* 308 U.S. 213, 220-221 (1939); *United States v. Brooklyn Eastern District Terminal,* 249 U.S. 296 (1919). Thus when respondent, in its own affidavit, specifically asserts that "PFE supplies refrigerator cars to any railroad in the United States desiring to use them . . . ." (A. 19),

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[13]Advertisements—by railroad companies specifically—have been found to constitute admissions against interest to be treated the same as any other such declaration; such evidence is not rendered any less competent by a contention that it was only an advertisement to catch the credulous public. *Southern Pacific v. Godfrey,* 48 Tex.Civ.App. 616, 621, 107 S.W. 1135 (1908); *Southern Pacific v. Allen,* 48 Tex.Civ.App. 66, 106 S.W. 441 (1908); Cf. *Lynch v. Bekins Van & Storage,* 31 Cal.App. 68, 159 Pac. 822 (1916); *Stringer v. Davis,* 35 Cal. 25 (1868).

Respondent offered no objection to the introduction of its advertising circulars in the District Court.

[14]Respondent's suggestion that perhaps the telephone companies across this country—rather than respondent—are "doing the holding out" (Brief for Respondent, 29) is without merit. P.F.E. is not compelled to acquire any classified telephone directory listings—especially if it does not endeavor to solicit business from the general public. Secondly, it is obvious that telephone companies must assign their classified headings in a manner consistent with commercial usage.

The use of telephone directory listings as corroborating evidence is not novel. *E.g., Arrow Aviation v. Moore,* 266 F.2d 488 (8th Cir. 1959); *Hood v. Bekins Van & Storage,* 178 Cal. 150, 172 Pac. 594 (1918). "We are of the opinion . . . that the fact that the regular issues of the directory of the telephone company are 'brought home to the public' is a matter of such common knowledge that there was no necessity for testimony with respect thereto." *Barron v. Board of Dental Examiners,* 44 Cal.App.2d 790, 795, 113 P.2d 247 (1941).

it again professes its common calling.[15] While respondent's concept of "common carrier by railroad" is indeed vague and elusive, P.F.E. is in every particular described by those words in their ordinary accepted usage.

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## II. INCLUSION OF P.F.E. WITHIN THE F.E.L.A. PRESERVES THE UNIFORM APPLICATION OF REMEDIAL RAILROAD LEGISLATION

The first paragraph of § 1 of the F.E.L.A. has stood unaltered since 1908. The task of determining the scope of the qualifying language, "common carrier by railroad", has fallen to the judiciary. Congress, however, has given clear indications that the Act is to be construed broadly and applied liberally.

The Interstate Commerce Act as amended in 1906 applies, inter alia, to "common carriers engaged in the transportation of passengers or property wholly by railroad . . . ." 34 Stat. 584, 49 U.S.C. § 1(a). All instrumentalities used in the transportation of persons or goods by rail are included within the term railroad." *Id.* at § 1(3). "Transportation" as used in the Act specifically includes "refrigeration or icing." *Id.* One who is engaged in the performance of a "railroad transportation service" is thus a carrier, and is a common carrier by railroad if the services are performed "as a common or public calling." *Union Stockyard v. United States, supra,* 308 U.S. 213, 218-

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[15]The affidavit of W. G. Cranmer also states that respondent rents its cars "to practically all railroads in the United States, Canada and Mexico. P.F.E. also furnishes protective services . . . to commodities carried in said cars . . . ." (A. 18.)

220 (1939).[16] While the Interstate Commerce Act does not, on its face, purport to control the breadth of the F.E.L.A., it is indeed significant that the general descriptive language regarding the railroad industry is strikingly similar.

With only minor variations in phrasing, the same broad concepts of common carrier, transportation, and railroad appear in each statute in Title 45 enacted as remedial legislation for the protection of working men in the railroad industry. Moreover, this Court has consistently used the same standards of inclusion in construing the Interstate Commerce Act,[17] the Hours of Service Act,[18] the Railway Labor Act,[19] the Federal Safety Appliance Acts,[20] and the Federal Employers' Liability Act,[21] thereby demonstrating the interrelationship of these statutes. As the court in *Bush v. Brooklyn Eastern District Terminal,* 218 N.Y.S. 516, 517, 218 App. Div. 782 (1926), so aptly reasoned:

> We think it was necessary to decide that the defendant was a common carrier by railroad in

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[16]This Court in *Union Stockyard* distinguished *Ellis v. Interstate Commerce Commission,* 237 U.S. 434 (1915), upon which respondent relies, on the basis that the record in *Ellis* contained "no allegation or proof that the corporation was engaged in a common calling or held itself out as ready or willing to supply cars or services on reasonable request." 308 U.S. at 221.

[17]*Union Stockyards v. United States, supra,* 308 U.S. 213 (1939).

[18]34 Stat. 1415, 49 U.S.C. § 61; *United States v. Brooklyn Eastern District Terminal Co., supra,* 249 U.S. 296 (1919).

[19]48 Stat. 1185, 45 U.S.C. § 151; *California v. Taylor,* 353 U.S. 553 (1957).

[20]27 Stat. 531, 45 U.S.C. § 1 et seq.; *United States v. California,* 297 U.S. 175 (1936).

[21]*Parden v. Terminal R. of Alabama Docks Dept., supra,* 377 U.S. 184 (1965).

> order to apply to it the Hours of Service Act, as was done by the United States Supreme Court . . . . We think it could not be a common carrier within that act, and not be a common carrier within the provisions of the FELA.

Respondent misconceives the significance of statutory references to refrigeration by suggesting that Congress sees refrigeration as an operation separate from the common carriage of goods by rail. The Railway Labor Act, 45 U.S.C. § 151, provides that the term "carrier" encompasses express companies, sleeping car companies, and carriers by railroad. The Act also extends to

> any company which is directly or indirectly owned or controlled by or under common control with any carrier *by railroad* and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, *refrigeration or icing*, storage, and handling *of property transported by railroad* . . . (Italics added.)

Congress thus has declared that refrigeration services (like railroad terminal or stockyard operations) are a function of common carriage by railroad while express and sleeping car operations are distinct and separate. The 1939 action of the Senate Committee on the Judiciary in deciding to delete a casually proposed inclusion of express companies, freight forwarders and sleeping car companies in the F.E.L.A. is quite consistent with the prior Congressional view of the railroad industry. It is most significant that the draft

bill before the committee did not mention refrigeration or icing, nor was that subject raised during Committee hearings.[22]

The fact is simply that Congress has never found it necessary to supplement the phrase "common carrier by railroad."[23] The business of freight forwarders and express companies can easily be distinguished from the operations of Pacific Fruit Express.[24] These businesses stand in relation to railroads essentially as shipper to carrier. Without these companies, the railroad industry could, without adjustment, continue to provide the same services to the

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[22]S. Rep. 661, 76th Cong., 1st Sess. 2 (1939). See also Hearings Before the Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act, 76th Cong., 1st Sess. (1939). Neither did the Committee discuss or consider any of the services or facilities encompassed in the decisions of this Court in the terminal, belt line, or stockyard cases.

[23]As noted earlier, questions of inclusion under the F.E.L.A. have been left to judicial interpretation. As is frequently the case, Congressional inaction may be subject to a variety of conflicting interpretations. See generally *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950); *Girouard v. United States*, 328 U.S. 61 (1946). While the court below commented on the lack of Congressional action since *Gaulden v. Southern Pacific Co., supra*, 78 F.Supp. 651 (N.D. Calif. (1948), aff'd 174 F.2d 1022 (9th Cir. 1949), the language of this Court in *Girouard* is apt: "The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." 328 U.S. at 70.

[24]Express and freight forwarding companies, however, are common carriers. The opinion in *Wells Fargo v. Taylor*, 254 U.S. 175, 176 (1920), begins with the description of the express company as "a common carrier by express." A freight forwarder collects, ships and distributes less than carload shipments of freight employing the services of various types of carriers; it too is classified as a common carrier. *Latsko v. National Carloading Corp.*, 192 F.2d 905, 909 (1951). Because these companies do not operate their own railroad transportation equipment, they have been exempted from the F.E.L.A.

general public which it now does. Without Pacific Fruit Express and its class of operations, however, the entire railroad industry would be disrupted as it struggled to provide the same protective facilities and services. Without express companies or freight forwarders, persons desiring to ship small parcels would be required to endure the slight inconvenience of delivering the freight directly into the hands of the carriers and, perhaps, picking the items up at their destination. Without refrigerator cars and protective services, however, the shipper of perishable commodities would be utterly unable to transport his goods by rail.

Judicial interpretation of the scope of the Employers' Liability Act has generally paralleled the boundaries implicitly described by Congress, with the notable exception of the few court decisions giving rise to the present controversy. Respondent attempts to dismiss the line of terminal, belt line and stockyard cases decided by this Court as generally arising under different remedial legislation. In turn, respondent relies in its brief upon a series of decisions which have essentially lost whatever vitality they may once have had. *Ellis v. Interstate Commerce Commission, supra,* 237 U.S. 434 (1915); *United States ex rel. Chicago etc. Refrigerator Co. v. I.C.C., supra,* 265 U.S. 292 (1924); and *U. S. v. Fruit Growers Express,* 279 U.S. 363 (1929). Each of these cases dealt with questions long put to rest by the monumental changes which have since occurred in the area of interstate commerce, not the least of which was the amendment

of the Interstate Commerce Act in 1940, 54 Stat. 898 et seq., providing a completely integrated regulatory system over common carriers in the United States.[25] In none of these cases was the F.E.L.A.—or any worker benefit—at issue. In each, the intent of the court to diminish rather than expand the impact of Congressional regulation was evident. All three were basically nullified by the 1940 amendments to the Interstate Commerce Act, 54 Stat. 917, which required the companies involved to report to the Commission in the same manner as all other instrumentalities of interstate common carriage in the United States.

*Ellis* was distinguished by this Court and is plainly inapposite in view of the abundant evidence of the public nature of P.F.E.'s activities.[26] The *Chicago Refrigerator* case represented an attempt by a lessor of rail cars (providing no other facilities or services) to obtain additional compensation for the use of its equipment by the United States government. Aside from the fact that this opinion does not analyze the public or private nature of that car company's offering to the railroads, the case is of so little moment that this Court has cited the decision but once.[27] In *United States v. Fruit Growers Express Co.*, the government sought to prosecute F.G.E. for fraud in

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[25] *United States v. Pennsylvania R. Co.*, 323 U.S. 612 (1944).

[26] See n. 16, *supra*.

[27] *United States v. American Railway Express Co.*, 265 U.S. 425 (1924), holding that an express company was not a common carrier by railroad within the Transportation Act of 1920. Subsequently, this Court has never found it necessary to distinguish Transportation Act cases in approaching problems under the F.E.L.A. and companion acts.

the provision of protective services.[28] The tone of the entire opinion makes it apparent that the government did not allege that Fruit Growers Express was itself a common carrier. It was simply undisputed that F.G.E. independently contracted with various carriers by railroad; neither the parties nor the court found any need to explore or define F.G.E.'s status in any greater detail.

Respondent insists upon narrow application of the F.E.L.A. by urging the *in terrorem* proposition that liberal construction of the Act will "create invidious and unjustifiable distinctions among workers as to the treatment of their work connected injuries." (Brief for the Respondent, 26.) It is, of course, exactly this type of unjustifiable distinction which petitioner attacks herein: denying federal protection to a railroad working man doing the same work with the same instrumentalities as a substantial proportion of workmen protected by the F.E.L.A. Petitioner believes that all employees in the railroad industry participating in the carriage of goods, sharing as they do the same hazards peculiar to that industry, should be afforded the humanitarian and remedial protections

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[28]Respondent has commented upon the fact that F.G.E.'s operations have been variously described. (Brief for the Respondent, 7 n. 2.) In fact, the opinion of this Court credits F.G.E. only with performing protective service operations and makes no mention of ownership of any cars. In *Hetman v. F.G.E.*, 346 F.2d 947, 949 (3rd Cir. 1965), on the other hand, the court specifically noted that plaintiff's decedent therein was employed by Rubel Corporation and that, while F.G.E. contracted for protective services to railroads, it "engages Rubel to perform the service. . . , The defendant [F.G.E.] had no control over the 'icing' operation in which the decedent was employed nor did it attempt to exercise any control."

of federal railroad legislation. It is not true that the proper liberal application of the F.E.L.A. will result in application of the Act to others than common carriers by railroad. Respondent misconstrues the holding of *Reed v. Pennsylvania R. R., supra,* 351 U.S. 502 (1955), which simply represents a finding that the plaintiff therein was closely and substantially involved in facilitating interstate commerce by railroad.

*Lone Star Steel Co. v. McGee,* 380 F.2d 640 (5th Cir. 1967), cert. den. ..... U.S. ..... (December 4, 1967), represents the most cogent modern analysis of the tests to be applied logically in the quest for the boundaries of the F.E.L.A.[29] After determining that the terminal facility and short line railroad cases are determinative of the status of *Lone Star,* the court stated:

> According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First—actual performance of rail service, second—the service being performed is part of the total rail service contracted for by a member of the public, third—the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a rail-

[29]Respondent does not discuss the standards described in *Lone Star Steel* but seeks to distinguish the decision because the company moved cars for the convenience of other businesses located within its plant grounds. The fourteen entities within the plant, although independently owned, "are integrated with the over-all operation of Lone Star" performing necessary auxiliary services. 380 F.2d at 642. All of Lone Star's railroad operations take place on its own property, yet it falls within the F.E.L.A. because its rail services "are a part of the total rail transportation contracted for and required by the industries located on its plant site." 380 F.2d at 647.

road or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth—remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad. 380 F.2d at 647.

Unquestionably Pacific Fruit Express satisfies each of the four conditions for F.E.L.A. inclusion.[30]

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## CONCLUSION

While government has rarely ever adopted a measure designed as a solution of some important social problem that could not be improved with time and experience, there has not yet been found any method of compensating injured railroad men and their next of kin that can be substituted satisfactorily for that provided by Congress in the FELA and the group of laws designed to supplement it. It has proved worthy to stand beside and in a position of equality with the remedies open to seamen, both in admiralty and in the law courts. Griffith, *The Vindication of a National Public Policy Under the Federal Employers'*

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[30]The court did not attach liability to Lone Star by piercing or disregarding its separate incorporation from the T & N Railroad. Rather, it was the fact that "the operations of the two are highly integrated and mutually dependent" that compelled the conclusion that Lone Star was part of a comprehensive rail transportation system. 380 F.2d at 648. The court also "specifically rejected as a controlling criterion the status which the entity declares itself to be in determining whether the entity is a common carrier." *Id.*

While Lone Star admitted that it was a carrier by rail but denied that it was a *common carrier by rail*, respondent has not been so candid.

*Liability Act,* 18 LAW AND CONTEMPORARY PROBLEMS 160, 187 (1953).

The Federal Employers' Liability Act is unquestionably one of the monumental compensation statutes and scarcely requires apologists before this Court. Respondent's impolitic scorn for this statute is most assuredly not motivated by any deep concern for the welfare of its employees or for railroad workmen generally. Rather, P.F.E. endorses the destruction of a system which attempts full compensation for railroad workers. While respondent boasts (without citation to the record herein) of its voluntary payment of minimal benefits to petitioner "without even an application being filed with the Compensation Board," it not surprisingly neglects to mention existing *federal* provisions which supplement and sustain the protections in the F.E.L.A. with additional guarantees of disability benefits.[31] P.F.E. asks in this case that the humanitarian principles developed in the sixty year history of the F.E.L.A. be ignored. Nor does P.F.E. stop with suggesting its own exclusion. Rather, wholesale abandonment of the F.E.L.A. for

[31]Brief for the Respondent, 19 n. 10. "Another factor which doubtless influences the railroad workers [in their support of the F.E.L.A. and opposition to workmen's compensation] is the sickness insurance provided under the Railroad Unemployment Insurance Act, 52 Stat. 1094 (1938), as amended, 45 U.S.C. §§ 351-367 (1958), as amended (Supp. II, 1959-60) and the disability and survivor's benefits under the Railroad Retirement Act, 49 Stat. 967 (1935), 50 Stat. 307 (1937), as amended, 45 U.S.C. 228a-228z (1958), as amended (Supp. II, 1959-60)." Brodie, *The Adequacy of Workmen's Compensation as Social Insurance,* 38 WISCONSIN LAW REVIEW 57, 87-88, n. 121 (1963). The Unemployment Insurance Act provides for temporary disability benefits for injury within the term "sickness." 45 U.S.C. 352.

the entire railroad industry is suggested, thereby subjecting railroad workers to schemes where "the amount of compensation awarded may be expected to go not much higher than is necessary to keep the worker from destitution."[32] Moreover, to exempt P.F.E. or any such function of the railroad industry from the F.E.L.A. is to entrust safety practices and improvements to the discretion of the individual company itself. Such confusion and lack of external standards is unthinkable in an industry wholly subject to federal regulation.[33] That respondent can so un-

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[32] 1 Larson, WORKMEN'S COMPENSATION LAW § 2.50, p. 11 (1966). The Larson work, an often cited multi-volume treatise on the law of workmen's compensation extols the fact that workmen's compensation "does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, *will presumbly enable him to exist without being a burden to others.*" *Id.*, italics added. See also, Note, *Rehabilitation Within the Workmen's Compensation Framework*, 19 ALABAMA L. REV. 401, 403 (1965).

Richter and Forer suggest that the only proper method to cure present criticism of the federal system would be to *add* a program of guaranteed workmen's compensation, duplicating the system which was developed in England. Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL LAW QUARTERLY 203 (1951). Cf. Marcus, *Advocating the Rights of the Injured*, 61 MICHIGAN L. REV. 921, 933-938 (1963).

[33] "Workmen's compensation acts ended enforcement of safety laws through personal injury suits; the compensation remedy for injured employees was exclusive." Brodie, *op. cit. supra* n. 31, at p. 62. P.F.E., unregulated by state utilities commissions (A. 20), is essentially free to ignore railroad safety requirements carrying only minimal penalty or enforcement devices in the absence of personal injury suits.

One of the most significant features of the Employers' Liability Act and its companion statutes is the uniformity achieved through the required application of federal statutory and decisional law exclusively in substantive matters. See *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 433 (1965), the most recent F.E.L.A. decision of this Court.

ashamedly ask to undermine the protective philosophy of railroad safety and injury law is incredible.

On the few occasions where questions of federal coverage for workers in the railroad industry have reached this Court after 1920, the applicable statute has in every instance been construed liberally and remedially. The result has been that the various elements of the railroad industry have gradually taken their place within this legislative program. Petitioner respectfully submits that the logical step should now be taken of including P.F.E. within the F.E.L.A. through reversal of the judgment of the court below.

Dated, San Francisco, California,
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Respectfully submitted,
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